BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LINDA EVERLY	)	
Claimant	)	
VS.	)	
	)	Docket No. 223,739
DILLON COMPANIES, INC.	)	
Respondent	)	
Self-Insured	)	

ORDER

Respondent appeals the Award of Administrative Law Judge Brad E. Avery dated October 28, 1998. In the Award, the Administrative Law Judge granted claimant an award based upon a functional impairment, but denied respondent's request for a deduction of claimant's preexisting functional impairment. Claimant alleges entitlement to a substantial work disability. Oral argument was held on June 2, 1999.

APPEARANCES

Claimant appeared by her attorney, Roger D. Fincher of Topeka, Kansas. Respondent appeared by its attorney, Scott J. Mann of Hutchinson, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations set forth in the Award of the Administrative Law Judge are adopted by the Appeals Board. In addition, respondent announced at oral argument before the Board that the issues raised in its brief, dealing with whether claimant suffered accidental injury, and whether claimant's injury arose out of and in the course of her employment with respondent on November 12, 1996, were being withdrawn and were no longer before the Board. The Appeals Board, therefore, affirms the award of the Administrative Law Judge that claimant has proven accidental injury arising out of and in the course of her employment with respondent on November 12, 1996.

ISSUES

(1) What was claimant's average weekly wage on the date of accident?

(2) What is the nature and extent of claimant's injury and/or disability? Is respondent entitled to a deduction of claimant's preexisting functional impairment? In addition, is claimant entitled to a substantial work disability as alleged?

(3) When considering claimant's average weekly wage, was there an overpayment of temporary total disability compensation? If so, is respondent entitled to credit for any overpayment which may have occurred?

(4) Did the Administrative Law Judge properly calculate the temporary total disability compensation and the total award due?

(5) Is claimant entitled to future medical treatment as a result of these injuries?

(6) Is claimant entitled to unauthorized medical treatment resulting from these injuries?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, including the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

Claimant suffered accidental injury while working for respondent on November 12, 1996, when, while helping push a forklift, boxes fell from a pallet, striking claimant. At the time, she felt and heard a pop in her neck, and began experiencing severe headaches. She informed her employer of the injury, and an accident report was prepared. However, claimant was not sent to a doctor and continued working for approximately a month and a half. On December 31, 1996, claimant suffered sharp pains in her arms and informed her supervisor she was going to Med-Assist. She was first treated for stroke, but was not diagnosed with a stroke. She was referred to Dr. Craig Yorke, a board certified neurosurgeon, and Dr. Amareneni, a neurologist. Respondent authorized Dr. Yorke's treatment, which included surgery on April 7, 1997, involving a cervical laminectomy at C3 through C6. Dr. Yorke testified that the purpose of the surgery was to prevent claimant

from having worse problems in the future. While he could not cure the spinal stenosis diagnosed in claimant's neck, he could hopefully avoid further worsening of the condition.

Following the surgery, the heaviness in claimant's left leg and in her left arm were eliminated. She continued having some pain at the outside of her left shoulder, which Dr. Yorke felt was muscular in origin. Claimant's headaches also seemed to improve. By June 1997, claimant's range of motion was almost completely normal, and Dr. Yorke released her to return to work on June 23, 1997. Claimant returned to four hours work per day during the first week, with a gradual increase to regular duty and a 40-hour week. She limited her lifting for the first two weeks to a maximum of 30 pounds.

When Dr. Yorke saw claimant on October 7, 1997, she was having posterior neck pain, which worsened as the day progressed. She was limited to approximately 15 degrees flexion. Her rotation and extension were nearly normal. Dr. Yorke recommended claimant take a six-week break from lifting chicken baskets, which appeared to be her primary problem, and also referred her for physical therapy. Claimant returned to Dr. Yorke on November 4, 1997, with little or no improvement. Claimant's pain worsened with activity and improved with rest. Dr. Yorke last examined claimant on November 11, 1997. At that time, cervical spine films showed no pathologic motion and Dr. Yorke felt claimant had reached maximum medical improvement. There was nothing else he could do for her, and he released claimant from his care.

During Dr. Yorke's treatment, claimant failed to mention that she was involved in two different motor vehicle accidents prior to her 1997 work accident. When first questioned about prior problems during the regular hearing, claimant initially denied any prior problems. However, when pressed on cross-examination, she acknowledged she had been involved in two car accidents several years before. A car accident in March of 1989 resulted in stiffness in her neck. Claimant was treated by Dr. Mark Penn, a chiropractor, on 24 occasions between March 1989 and May 1989. Her complaints, at that time, included neck pain, right low back pain and muscle spasms in her back. Claimant was also treated on one occasion for right shoulder pain.

Claimant was involved in a second automobile accident in July 1990 when the vehicle she was in was struck from behind by another vehicle. At that time, her complaints involved the neck and upper back. Dr. Penn treated claimant for this accident through September 1990, for a total of 37 times. Claimant also periodically returned to Dr. Penn for chiropractic adjustments between December 1990 and May 1993. These adjustments generally involved treatment for neck pain and headache pain. Dr. Penn again saw claimant on November 7, 1994, at which time her complaints included the neck. Dr. Penn testified he did not see claimant after May 1994, but then he testified he saw her on November 7, 1994. He was not authorized to treat and did not examine claimant for the 1996 injury suffered with respondent.

Dr. Yorke was asked whether the event at Dillons contributed to claimant's spinal stenosis. He felt that, even with the multiplicity of other events of everyday life and the automobile accidents, the accident that day at Dillons did contribute to claimant's ongoing symptoms. He assessed claimant a 15 percent permanent partial impairment to the body as a whole as a result of the stenosis in her neck based upon the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition. He also confirmed that claimant suffered, to some extent, from a narrowing of her cervical spine prior to her accident at Dillons. When pressed as to what percentage of the 15 percent preexisted, he admitted that he could not answer that question in a rational way. By tossing a coin, he decided claimant suffered 50 percent of her impairment prior to the 1996 accident with respondent.

When Dr. Yorke last saw claimant in November 1997, he felt claimant capable of returning to gainful employment, 40 hours per week. He placed no specific, hard and fast restrictions on her, simply testifying that claimant should work within her limits. He felt she could be as active as other women her age in terms of what she lifted and what she did not. He had no medical explanation for claimant's allegation that her headaches and neck pain prohibited her from working 40 hours a week.

Claimant was referred to Dr. Zita Surprenant on August 19, 1997, by her attorney. The history of injury was consistent with that testified to by claimant. However, Dr. Surprenant acknowledged she did not know how much the boxes that fell on claimant weighed, but did not believe this to be a significant factor in determining causation. Dr. Surprenant assessed claimant a 25 percent whole person impairment under the AMA Guides, Fourth Edition, finding claimant to fall within a category IV under the DRE. However, on cross-examination, Dr. Surprenant acknowledged that her functional impairment should actually be 21 percent under the AMA Guides, Fourth Edition. Dr. Surprenant was provided a copy of a task list prepared by Bud Langston, a vocational rehabilitation expert. In reviewing the tasks contained in the list, Dr. Surprenant found claimant could perform five of the thirteen tasks listed and was unable to perform eight of the thirteen. This resulted in a task loss of 62 percent. However, when considering the time weighted involvement of those various tasks, Dr. Surprenant agreed with Mr. Langston's opinion that claimant would not be able to perform 55 percent of the tasks listed. While Dr. Surprenant had the opportunity to discuss some of the tasks listed in Mr. Langston's list, she did not have the opportunity to discuss all. The task analysis was provided to Dr. Surprenant approximately 15 minutes prior to the beginning of her deposition. Dr. Surprenant recommended that claimant avoid awkward positions with her cervical spine and repetitive bending activities. She felt her lifting should be no greater than 40 pounds.

When claimant initially returned to work, she was put on a job of frying chickens. This caused claimant pain as she was regularly lifting baskets of chickens weighing 15 pounds or more. She spoke to her boss, Mike Augustine, requesting that he rotate her to a different job. Claimant was rotated to different jobs, and the rotations helped resolve some of her physical difficulties. Claimant did, however, request a transfer to a different

store because she felt it would be better for her, alleging the different store was less busy than the one she was working at at 21st and Belle. The new store was located at 29th and California. However, Ron Wells, the store manager of respondent's store at 21st and Belle, testified that the delicatessen work at both stores was approximately the same.

While working on the lighter, less physical job, claimant was terminated from her employment. The termination resulted from a situation where claimant was found to be eating a piece of chicken which had not been purchased by her. This was a violation of respondent's company policy. When first questioned at the preliminary hearing about the chicken incident, claimant testified that nothing had ever been said about not taking merchandise without paying for it. Claimant went on to say that everyone does it. However, when questioned at regular hearing, claimant stated that she had originally planned to pay for the chicken, but discovered that her money and her keys had been inadvertently locked in her locker. She went ahead and ate the chicken, planning to request a Dillons' employee to cut the lock from her locker, so that she could obtain money and pay for the chicken later. However, she was caught after having eaten the chicken without paying for the chicken. As a result of this incident, claimant was terminated from her employment. Claimant obtained employment, after leaving respondent, in a cafeteria in a state office building. She was working four and a half to seven hours a day, five days a week, earning $5.75 an hour. She was not receiving any fringe benefits at this new job.

While working for respondent, claimant was hired as a PT 32, indicating that she would work at least 32 hours a week, and qualifying her for health insurance benefits. From December 28, 1995, to March 10, 1996, claimant took a leave of absence from her employment with respondent in order to care for her mother, who was dying of cancer.

In March 1996, when her leave time was almost totally used up, claimant talked to Cynthia, a supervisor, and was advised that, if she could work at least five hours a week, she could stay on as an employee of Dillons. If she did not return to work, she would lose her employment. Claimant agreed to give respondent at least five hours per week and at times was able to work more. Claimant continued in this part-time capacity until September 1996, when she began increasing her hours. Claimant ultimately returned to nearly full-time work and, on several occasions, put in 40 hours per week, prior to her accident.

While claimant was working part-time, claimant's mother died. It is not clear from the record exactly when claimant's mother died, however, it is noted in Claimant's Exhibit 1 to the preliminary hearing of December 10, 1997, that claimant took vacation during the week of July 21, 1996. It was also noted during the week of August 18, 1996, claimant worked no hours, but was paid $32.50, the source of which is unknown. For the remainder of the 26 weeks preceding claimant's accident, claimant worked anywhere from 10 hours to 40 hours per week. During this time frame, claimant earned $4,040.40 in total wages. Claimant continued receiving fringe benefits through November 7, 1997.

Claimant was paid 13 weeks temporary total disability compensation, with all the temporary total disability compensation paid prior to the termination of claimant's fringe benefits. Claimant and respondent agree that claimant's fringe benefit package computed to $78.48 per week.

CONCLUSIONS OF LAW

Claimant contends her average weekly wage should be computed utilizing the period excluding claimant's work through August 25, 1996. Claimant's pay sheet shows a substantial increase in the numbers of hours worked beginning August 25, 1996, and continuing through the date of accident. Claimant argues the prior weeks, during which time claimant was working a reduced workload due to the illness of her mother, should not be considered. In a preliminary Order dated December 12, 1997, Administrative Law Judge Floyd V. Palmer entered an order, finding claimant's average weekly wage to be $246.90, resulting in a compensation rate of $164.61 per week. Administrative Law Judge Avery, in the Award, affirmed this average weekly wage of $246.90 and added the $78.48 per week fringe benefit package, resulting in a total average weekly wage of $325.48. The Administrative Law Judge did not include the portion of the 26 weeks, when claimant was working the reduced hours taking care of her mother, rationalizing that claimant's leave of absence should be treated as sick leave or vacation leave and should not count in the computation of claimant's average weekly wage. The Administrative Law Judge went on to state that a leave of absence, sick leave or vacation "does not require a full week's absence from work."

The question of whether the weeks involved in a leave of absence should be included in the calculation of an employee's average weekly wage was addressed by the Kansas Supreme Court in Elder v. Arma Mobile Transit Co., 253 Kan. 824, 861 P.2d 822 (1993).

In Elder, the Kansas Supreme Court discussed whether a period of eight weeks, during which claimant did not work or earn wages, should be included in computing claimant's average weekly wage. The administrative law judge, the director and the district court found that the eight weeks during which the deceased worker did not work, but could have if he wanted to, should be included in the computation of claimant's average weekly wage. The Supreme Court, however, in considering the language of K.S.A. 1992 Supp. 44-511(b)(5), reversed. The appropriate version of the statute, which has not changed since Elder, states in part:

> "(5) If at the time of the accident the money rate is fixed by the output of the employee, on a commission . . . basis, . . . and if the employee has been employed by the employer at least one calendar week immediately preceding the date of the accident, the average gross weekly wage shall be the gross amount of money earned during the number of calendar weeks so employed, up to a maximum of 26 calendar weeks immediately preceding

> the date of the accident, divided by the number of weeks employed, or by 26 as the case may be . . . . In making any computations under this paragraph (5), workweeks during which the employee was on vacation, leave of absence, sick leave or was absent the entire workweek because of illness or injury shall not be considered."

The Supreme Court reasoned that the exclusion discussed in the statute must be due to vacation, leave of absence, sick leave, illness or injury. The key question was whether claimant was employed, meaning "actually employed and on the job . . . ." Zeitner v. Floair, Inc., 211 Kan. 19, 24, 505 P.2d 661 (1973); Osmundson v. Sedan Floral, Inc., 10 Kan. App. 2d 261, 264, 697 P.2d 85 (1985). The Elder court, citing both Zeitner and Osmundson, went on to state that unemployment means "any week during which such individual performs no services and with respect to which no wages are payable to such individual." The Court also noted that a "leave of absence" is not a complete separation from employment, but merely a temporary absence from duty with the intention to return, during which time the performance of the duties by the employee and remuneration by the employer are "suspended". Elder at 831. In this instance, there was a several-month period when claimant's duties with respondent and respondent's remuneration to claimant were suspended. However, during the period May 19, 1996, through November 10, 1996, the week before claimant's accidental injury, there was only one period where claimant was actually on vacation, that being the week of July 21, 1996. There was one additional week of August 18, 1996, when claimant earned no base wage hours and no base wage dollars, but was paid $32.50, the origin of which is unexplained.

In applying the Supreme Court's logic in Elder, the Appeals Board finds that, while claimant was working limited duty during the time in question, she was not on a leave of absence, as the performance of claimant's duties for respondent and the remuneration by respondent were not "suspended." They were merely reduced. Claimant cannot be found to be unemployed during those periods of time because claimant performed service and earned wages during that time. Therefore, the Appeals Board finds, in computing claimant's average weekly wage for the injury dated November 12, 1996, 24 of the 26 weeks listed on Claimant's Exhibit 1 from the preliminary hearing shall be used. As claimant earned a total of $4,040.40 during this time, this computes to an average weekly wage of $168.35 per week.

In considering the fringe benefits and their application to claimant's average weekly wage, the Appeals Board notes, under K.S.A. 44-511(a)(2), additional compensation, which includes claimant's insurance fringe benefit package, shall not be included in the value of claimant's average weekly wage "unless such remuneration is discontinued." As claimant continued receiving her fringe benefits through November 7, 1997, and as all of claimant's temporary total disability compensation was paid prior to that date, the temporary total disability compensation should have been based upon an average weekly wage of $168.35. This results in a temporary total disability rate of $112.24 per week. When considering the December 12, 1997, Order of Judge Palmer, granting claimant

compensation at the rate of $164.61, this computes to an overpayment of $52.37 per week. Pursuant to K.S.A. 1996 Supp. 44-525(c), respondent is entitled to a credit for such overpayment against any additional disability benefits awarded to claimant.

Claimant alleges entitlement to a substantial work disability in this matter. However, the Administrative Law Judge, in considering the circumstances surrounding claimant's termination for misconduct, found the principles of Lowmaster v. Modine Manufacturing Co., 25 Kan. App. 2d 215, 962 P.2d 1100 (1998), and Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), to apply. The Administrative Law Judge found claimant, who was working in respondent's delicatessen, was terminated for eating a piece of chicken without paying for it. A clear company policy prohibited this activity and it resulted in claimant's termination. As claimant was working at a job which paid 90 percent or more of her average weekly wage at the time of the accident, under K.S.A. 1996 Supp. 44-510e, the Appeals Board finds claimant is limited to her functional impairment.

In deciding claimant's entitlement to a functional impairment, the Appeals Board will consider not only the percentage of functional impairment, but also the respondent's contention that a reduction under K.S.A. 1996 Supp. 44-501c is appropriate.

Dr. Zita Surprenant assessed claimant a 25 percent whole body functional impairment which, during her deposition, she revised to 21 percent under the AMA Guides, Fourth Edition. Dr. Surprenant felt claimant fell within a category IV of the DRE of the AMA Guides, Fourth Edition. Dr. Surprenant, however, had the opportunity to examine claimant on only one occasion.

Dr. Craig Yorke, claimant's treating physician, had the opportunity to examine claimant on numerous occasions, and performed the cervical laminectomy on claimant in 1997. He also used the AMA Guides, Fourth Edition, in assessing claimant a 15 percent impairment to the body as a whole for the stenosis in her neck. The Appeals Board finds that Dr. Yorke, as claimant's treating physician, was in a better position to assess what, if any, functional impairment claimant may have had from these injuries. The Appeals Board, therefore, finds claimant is entitled to a 15 percent whole body functional impairment for this injury.

Respondent contends that, under K.S.A. 1996 Supp. 44-501(c), it is entitled to a reduction in the amount of functional impairment which preexisted claimant's condition. Dr. Yorke, in reviewing the tests performed on claimant and considering claimant's history, found she did have a preexisting functional impairment in her cervical spine. In deciding what, if any, portion of the 15 percent functional impairment preexisted claimant's work-related injury, Dr. Yorke admitted he could not do so in a rational way, but instead tossed a coin in finding 50 percent of claimant's functional impairment preexisted the injury. The Appeals Board acknowledges that a coin toss may be very effective at the beginning of a football game. However, in workers' compensation, litigants must deal with credible

medical evidence and not coin tosses. The Appeals Board, therefore, finds that Dr. Yorke's opinion, regarding claimant's preexisting functional impairment does not give rise to a reasonable degree of medical probability and, therefore, cannot be deemed credible. The Appeals Board, therefore, denies respondent's request for a reduction in claimant's functional impairment, and affirms the Administrative Law Judge's award of a 15 percent whole body functional impairment in this matter. The Appeals Board further affirms the Administrative Law Judge's award of both future and unauthorized medical.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Brad E. Avery dated October 28, 1998, should be, and is hereby, modified as to the average weekly wage and temporary total disability compensation, and affirmed in all other regards. Claimant, Linda Everly, is granted an award against the respondent, Dillon Companies, Inc., a qualified self-insured, for an accident which occurred on November 12, 1996, for a 15 percent whole body functional impairment, based upon an average weekly wage of $168.35 through November 7, 1997, and average weekly wage of $246.83 thereafter. Temporary total disability compensation will be paid at the rate of $112.24 per week, as it all was paid prior to the addition of the fringe benefits to claimant's average weekly wage.

Claimant is entitled to 13 weeks temporary total disability compensation at the rate of $112.24 in the amount of $1,459.12, followed thereafter by 38.43 weeks permanent partial disability compensation at the reduced rate of $112.24 per week in the amount of $4,313.38 through November 7, 1997. Thereafter, claimant is entitled to 23.82 weeks permanent partial disability compensation at the increased rate of $164.56 in the amount of $3,919.82, for a total award of $9,692.32. As of the date of the Award, the entire amount is due and owing minus any amounts previously paid.

Claimant is further awarded future medical upon proper application to and approval by the Director.

Claimant is awarded unauthorized medical care up to the statutory maximum upon presentation of an itemized statement verifying same.

Claimant's contract of employment is approved insofar as it does not contravene the provisions of the appropriate version of K.S.A. 44-536.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are assessed against the respondent to be paid as follows:

Nora Lyon and Associates

Transcript of Regular Hearing	$184.65
Curtis, Schloetzer, Hedberg, Foster and Associates	
Transcript of Preliminary Hearing	$186.70
Deposition of Ron Wells	$205.20
Deposition of Dr. Zita Surprenant	$261.00
Deposition of Dr. Craig Yorke	$170.50
Deposition of Patty Bossert	$105.20
Continuation of Regular Hearing	$405.00
Appino and Biggs	
Deposition of Mark Penn, D.C.	$142.80

IT IS SO ORDERED.

Dated this ____ day of June 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger D. Fincher, Topeka, KS
Scott J. Mann, Hutchinson, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director